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No. 09-334

Supreme Court, U.S.
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In The
Supreme Court of the United States

SCOTT A. HEIMERMANN,

Petitioner,

v.

GARY R. MCCAUGHTRY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin District IV

BRIEF IN OPPOSITION OF RESPONDENT JOANNE SWYERS

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Petitioner fails to present an issue worthy of consideration by this Court where his claims under 42 U.S.C. § 1983 call into question the validity of his conviction and where dismissal of these claims pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) has not been shown to conflict with controlling precedent.

PARTIES TO THE PROCEEDINGS

Petitioner Scott A. Heimermann, *Plaintiff-Appellant below, Petitioner*

Gary R. McCaughtry, Mark W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan, Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma, Lynda J. Schwandt, John Doe and John Doe 2, *Defendants below*

Respondent Joanne Swyers, *Defendant-Respondent below, Respondent*

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INTRODUCTION

Through his petition for a writ of certiorari (Petition), Petitioner Scott A. Heimermann improperly attempts to reinvent his claims against Respondent Joanne Swyers. The Petition itself discloses that the Wisconsin Court of Appeals correctly concluded that Petitioner's claims under 42 U.S.C. § 1983 are barred under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). Petitioner does not identify a conflict between a decision of a state court of last resort and the relevant decisions of this Court on an important federal question. Petitioner does not identify a conflict between a decision of a state court of last resort and a United States Court of Appeals on an important federal question. Petitioner does not identify an important question of federal law that has not been, but should be, settled by this Court. Petitioner has presented no reasons justifying certiorari review in this case. His Petition should be denied. Sup. Ct. R. 10.

STATEMENT OF THE CASE

Petitioner "was convicted in 1992, after a jury trial, of two counts of first-degree intentional homicide as a party to a crime." (Petitioner's Appendix [P. App.] at 2a, ¶ 1). Along with two other men, Edward Piscitello and Joseph Isajiw, Petitioner was charged for the execution-style killing of an apparent drug dealer and his bodyguard in Milwaukee, Wisconsin.

(P. App. at 2a, ¶ 2). Petitioner's conviction was affirmed by the Wisconsin Court of Appeals in *State v. Heimermann*, No. 95-0225-CR, 1995 WL 465150 (Wis. Ct. App. Aug. 8, 1995), and the Supreme Court of Wisconsin denied his petition for review. (P. App. at 3a, ¶ 3). As summarized by the Wisconsin Court of Appeals, Petitioner has since "repeatedly attempted to challenge his conviction, both directly and indirectly," having "filed approximately thirty-nine appeals and writs in [the Wisconsin Court of Appeals] since 1991." (P. App. at 3a, ¶ 3 n.1). According to Petitioner, he has also pursued avenues for habeas corpus relief through the federal courts. (Petition at 7-13). However, none of his challenges have been successful and Petitioner remains in prison.

In May 2004, Petitioner filed in the Dane County Circuit Court a Complaint against Respondent Joanne Swyers and numerous state defendants.[1] (*See* P. App.

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[1] The state defendants include Gary R. McCaughtry, Mark W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan, Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma, and Lynda J. Schwandt. (P. App. at iii, 17a-18a). The Dane County Circuit Court Order from which Petitioner appealed to the Wisconsin Court of Appeals dismissed only the claims against Respondent Swyers. (P. App. at 5a, ¶ 7 n.3). The state defendants were not named as Respondents in the proceedings below. (P. App. at 1a). The state defendants are not named as Respondents in the Petition before this Court. Contrary to Petitioner's frequent and somewhat confusing references to "Respondents" throughout his Petition, *see, e.g.*, Petition at i-ii (Questions Presented), Respondent Swyers is the only Respondent before this Court. On September 17, 2009,

(Continued on following page)

at 17a). In the Complaint, Petitioner asserted five claims against Respondent, including: 1) a breach of contract claim; 2) a claim alleging denial of substantive due process relating to post-conviction access to evidence; 3) an access to courts claim; 4) a failure to protect claim; and 5) a claim of concerted action under Wis. Stat. § 895.045(2). (P. App. at 20a-23a; *see also* P. App. at 4a, ¶ 5). Petitioner requested relief in the form of temporary and permanent injunctions, a declaratory judgment and more than four million dollars in compensatory damages. (P. App. at 4a, ¶ 5).

Respondent is an employee of Dodge County, Wisconsin and at the times relevant to the Petition worked as an investigator with Dodge County Sheriff's Department. In 1998, Respondent investigated criminal activity at the Dodge Correctional Institution, a Wisconsin Department of Corrections facility. In this capacity, Respondent encountered Petitioner, learned of his involvement in criminal activity, and interacted with Petitioner in the context of an investigation. She is not now, nor was she at the times addressed by the Petition, employed by any Milwaukee law enforcement agency or Milwaukee prosecutor's office.

Respondent moved to dismiss all of Petitioner's claims against her. (P. App. at 18a). The Dane County Circuit Court granted Respondent's motion, dismissing

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counsel for the state defendants filed a Waiver indicating no response to the Petition would be filed on their behalf.

the claims with prejudice by Order dated September 28, 2007. (P. App. 31a). In so doing, the Dane County Circuit Court incorporated portions of analysis set forth in its September 27, 2007, Order dismissing some of Petitioner's claims against the state defendants. (P. App. 18a-19a, 27a).[2] As is relevant to this Court's consideration of the Petition, the Dane County Circuit Court found the Petitioner's substantive due process and access to courts claims barred by *Heck*. (P. App. at 26a-27a, 30a-31a; R. App. at 7, 11-14, 18).

Petitioner appealed from the Dane County Circuit Court Orders dismissing his claims against Respondent, denying his motion for reconsideration, and awarding costs to Respondent. (P. App. at 2a, ¶ 1). The Wisconsin Court of Appeals affirmed each of the orders from which Petitioner appealed. (P. App. at 1a-12a). Petitioner next petitioned the Supreme Court of Wisconsin for discretionary review of the treatment of his substantive due process claim relating to post-conviction access to evidence and his access to courts claim.[3] (*See* Petition at 20). The Supreme Court of Wisconsin denied his petition for review. (P. App. at 32a-33a).

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[2] The September 27, 2007, Dane County Circuit Court Order is made a part of the Appendix to this Brief in Opposition. (Respondent's Appendix [R. App.] 1-19).

[3] Petitioner also sought review by the Supreme Court of Wisconsin of his failure to protect claim, but that issue does not bear on the Petition before this Court.

The Wisconsin Court of Appeals reviewed *de novo* whether Petitioner's Complaint stated a substantive due process claim relating to post-conviction access to evidence and an access to courts claim. (P. App. at 4a-5a, ¶ 6) (citing *Meyer v. Laser Vision Inst., LLC*, 2006 WI App 70, ¶ 13, 290 Wis. 2d 764, 714 N.W.2d 223). The Wisconsin Court of Appeals discussed these claims as follows:

> ¶11 The circuit court also dismissed Heimermann's claim that Swyers and the others denied him substantive due process by denying him access to the alleged testimony of Piscitello.[4] When a plaintiff seeks to recover damages under 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment or other action that would render a conviction invalid, the "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. Consequently, when a prisoner seeks damages under § 1983, the court must consider whether judgment for the plaintiff "would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487.

¶12 In his complaint, Heimermann refers to Piscitello's testimony as "the missing ingredient to plaintiff's release from prison recipe." The circuit court concluded that he was seeking exculpatory testimony from Piscitello that would call into question the validity of his underlying conviction. We conclude that, based on the allegations of the complaint, Heimermann is challenging his conviction and imprisonment, and consequently, his claim is barred by *Heck*.

¶13 Heimermann also alleges that Swyers violated his right to access to the courts by withholding certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the "true focus" of Fecke's investigation, the circuit court hearing the habeas petition was prevented from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by *Heck*.

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[4] Heimermann does not explain in his brief what the exculpatory testimony would be.

(P. App. at 6a-7a, ¶¶ 11-12).

REASONS FOR DENYING THE PETITION

I. THE PETITION ITSELF REFLECTS PETITIONER'S ATTACK ON HIS CONVICTION, AND CONFIRMS THE WISCONSIN COURT OF APPEALS APPROPRIATELY CONLUDED PETITIONER'S § 1983 CLAIMS ARE BARRED BY *HECK V. HUMPHREY*, 512 U.S. 477, 114 S. CT. 2364 (1994).

In his Statement of the Case, Petitioner presents a distorted and unnecessarily expansive background, beginning with his own upbringing and continuing through the Supreme Court of Wisconsin's denial of discretionary review below. (Petition at 2-20). Petitioner first mentions Respondent in the last of nine subsections in his Statement of the Case. (Petition at 16-17). The accuracy of much of the information presented cannot be confirmed and is, in any event, irrelevant to this Court's consideration of the Petition.

Through his § 1983 Complaint, Petitioner sought unspecified "exculpatory evidence" from Piscitello, another of the men charged with the murders for which Petitioner was convicted as a party to the crimes. As noted by the Dane County Circuit Court, Petitioner alleged that this exculpatory evidence was "the missing ingredient" in his "release from prison recipe." (P. App. at 21a-22a) (quoting Complaint ¶ 109). The Wisconsin Court of Appeals similarly understood this to be Petitioner's objective based on his appellate briefs. (P. App. at 5a, ¶ 7) (summarizing Petitioner's claims as including a claim that Respondent

and others offered to help him obtain "exculpatory evidence from his co-actor Piscitello"); (Petition at 7a, ¶ 12) ("In his complaint, Heimermann refers to Piscitello's testimony as the 'missing ingredient to plaintiff's release from prison recipe.' ").

The Wisconsin Court of Appeals understood Petitioner to be claiming that Respondent "denied him substantive due process by denying him access to the alleged testimony of Piscitello" though Petitioner failed to explain in his appellate brief "what the exculpatory testimony would be." (P. App. at ¶¶ 11 n.4). The Wisconsin Court of Appeals further understood Petitioner to be claiming that Respondent denied his "right of access to the courts by withholding certain information" including about "her attempts to locate Piscitello" thereby preventing the Wisconsin Circuit Court hearing the habeas petition "from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice." (P. App. at 7a-8a, ¶ 13). The Wisconsin Court of Appeals concluded that Petitioner's claims were both barred by *Heck* because they called into question the validity of his conviction and challenged Petitioner's conviction and imprisonment. (P. App. at 7a-8a, ¶¶ 12-13). As the Wisconsin Court of Appeals observed in discussing other aspects of Petitioner's Complaint, "to the extent Heimermann is attempting to have himself exonerated from the underlying criminal conviction by information he claims Piscitello will provide, Swyers would not be able to obtain this result for him." (P. App. at 6a, ¶ 10).

Petitioner now attempts to reinvent and recast his § 1983 claims against Respondent for purposes of his Petition. He no longer couches the evidence sought in terms of Piscitello's allegedly exculpatory testimony. This may be owing to Petitioner's acknowledgement that he obtained and presented to more than one reviewing court multiple affidavits by Piscitello but was unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison. (Petition at 10-12). These efforts may also be due to his assertion that Piscitello died in September 2006. (Petition at 18 n.13).

Unlike his Complaint, the Petition is focused on what Petitioner calls "'as-yet-undisclosed state evidence'" consisting of "records presumably still being withheld by the county's prosecutors and Milwaukee law enforcement." (Petition at 13-14). Petitioner's reinvention of his claims is problematic for a number of reasons. These records are not the subject of Petitioner's Complaint allegations or claims against Respondent nor were these claims addressed by the courts below. Petitioner is even uncertain as to the existence of any such records. Petitioner has not alleged or established that Respondent, who is neither a member of the City of Milwaukee Police Department nor the Milwaukee County District Attorney's Office, has control over any such records.

The Petition otherwise confirms that, through his § 1983 action, Petitioner is improperly challenging the validity of his criminal conviction. He states that his co-actor Piscitello framed him for the murders

underlying Petitioner's conviction. (Petition at 4 n.3). Petitioner recounts the Milwaukee Police Department's investigation and Milwaukee County District Attorney's Office's prosecution of the murders, Petition at 3-7, before concluding "the Milwaukee police coerced the testimony of Isajiw and Danbrova to frame Heimermann for Binwalee and Russell's murders." (Petition at 7). Petitioner also attacks the motivations of Milwaukee law enforcement officers in their investigation. (Petition at 11 n.8). Petitioner then contorts these dubious assertions to state "that Milwaukee law enforcement facilitated the circumstances that led to the deaths of Binwalee and Russell, not Heimermann." (Petition at 19) (citing *State v. Steadman*, 152 Wis. 2d 293, 302, 448 N.W.2d 267 (Wis. Ct. App. 1989); *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637 (1973)). Petitioner apparently contends that by failing to oppose the release from custody of murder victim Binwalee and by allowing Petitioner to interact with Piscitello, "Milwaukee law enforcement" engaged in conduct justifying treating Piscitello and the state as one. (Petition at 19) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 245, 351 (1974)). The three cases cited are inapplicable to Petitioner's claims and do not justify certiorari review. The cases cited only evince Petitioner's improper attack on his conviction through his § 1983 claims.[4]

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[4] *Steadman* involved a due process claim asserting that the government's involvement in providing all the elements for the

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In stating that his "void prosecution argument is in accord with well-established law," Petition at 19, Petitioner confirms that his claims are *Heck* barred. He relies upon *State v. Campbell*, 2006 WI 99, ¶¶ 51-55, 294 Wis. 2d 100, 718 N.W.2d 649 (citing *Hazel-Atlas Glass Co.*, 322 U.S. 238, 244, 64 S. Ct. 997 (1944)) and *State ex rel. Doxtater v. Murphy*, 248 Wis. 2d 593, 602, 22 N.W.2d 685 (1946). (Petition at 19-20). The cases cited are inapplicable to Petitioner's claims and do not justify certiorari review. Petitioner's assertion and the cases he cites further evince his improper attack on his conviction through his § 1983 claims.[5]

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commission of the crime of which Steadman was convicted warranted dismissal of the charges. The Wisconsin Court of Appeals found no due process violation. 152 Wis. 2d at 296-303. In *Russell*, this Court reversed a decision of the United States Court of Appeals for the Ninth Circuit which improperly expanded the traditional notions of entrapment to recognize a new defense. 411 U.S. at 427-36. *Jackson* addressed whether a privately owned utility subject to substantial state regulation is engaged in state action and is therefore subject to due process scrutiny for having terminated a customer's electric service, which termination was challenged in a § 1983 action. This Court found no state action by the utility. 419 U.S. at 351-60.

[5] In *Campbell*, the Supreme Court of Wisconsin held that a circuit court may permit collateral attack on a judgment or order procured by fraud if the fraud is jurisdictional making the order or judgment void and negating an element of a crime, or if the fraud raises an affirmative defense to the crime. 2006 WI 99, ¶ 4. *Doxtater* found that a criminal defendant who entered a guilty plea was not entitled to a writ of habeas corpus though the trial court erred in failing to advise the defendant of his right to counsel because the defendant had an adequate remedy

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The Petition itself demonstrates that the Wisconsin Court of Appeals properly concluded that Petitioner's § 1983 claims against Respondent are barred by *Heck*. The Petition should be denied.

II. PETITIONER HAS NOT SHOWN A CONLICT BETWEEN THE WISCONSIN COURT OF APPEALS' DECISION AND THIS COURT'S PRECEDENT.

Petitioner asserts that a conflict exists between the Wisconsin Court of Appeals' decision affirming dismissal of his access to courts claim and claim for access to post-conviction evidence and this Court's precedent in *Spencer v. Kemna*, 523 U.S. 1, 20-21, 118 S. Ct. 978 (1998) and *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308 (2009) ("*Osborne*"). He is incorrect.

Spencer addressed whether a pending petition for a writ of habeas corpus seeking to invalidate an order revoking parole was mooted by Spencer's release upon serving his entire term of imprisonment. *Spencer*, 523 U.S. at 3. The majority of this Court held that Spencer's release rendered his habeas petition moot, as there were no collateral consequences adequate to meet the injury-in-fact requirement of Article III of the United States Constitution. *Id.* at 14. This Court rejected Spencer's argument that his

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through appeal or a writ of error to review his conviction. 248 Wis. at 603.

habeas petition could not be moot because he would be foreclosed under *Heck* from pursuing damages in an action under 42 U.S.C. § 1983. *Id.* at 17. Justice Scalia observed, "This is a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.*

Petitioner relies only on the concurring opinion of Justice Souter in *Spencer*, which discusses the anomalous results that would occur through "application of the favorable-termination requirement [of *Heck*] to § 1983 suits brought by plaintiffs not in custody." *Id.* at 20-21 (Souter, J., concurring). Justice Souter wrote, "The better view, then, is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21.

Even if Petitioner could show that what he labels "Justice Souter's principle in *Spencer*," Petition at 25, is the controlling authority of this Court, it is inapplicable to Petitioner's claims. Petitioner neither alleged in his Complaint nor asserts in his Petition that he is not "in custody." Nor could he; Petitioner remains in custody serving a sentence on the very conviction impugned by his § 1983 claims. The Wisconsin Court of Appeals' decision is not in conflict with the holding of *Spencer*.

Citing *Osborne*, Petitioner states "this Court assumed, without deciding, that a freestanding substantive due process right to access state evidence claim is not barred by *Heck*." (Petition at 26). Petitioner mischaracterizes the holding and applicability of *Osborne*.

Osborne filed a § 1983 action claiming that the Due Process Clause and other constitutional provisions gave him a constitutional right to access existing DNA evidence in the state's possession in order to conduct more discriminating testing than was available at the time of his criminal trial. *Osborne*, 123 S. Ct. at 2315. The district court initially dismissed these claims as barred by *Heck*, concluding Osborne was required to proceed through a writ of habeas corpus. *Id.* The United States Court of Appeals for the Ninth Circuit reversed this decision without expressing an opinion as to whether Osborne had been deprived of a federally protected right. *Id.* (citing *Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 423 F.3d 1050, 1056 (9th Cir. 2005)). On remand, the district court addressed cross summary judgment motions and concluded that "there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought." *Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 445 F. Supp. 2d 1079, 1081 (2006). The Ninth Circuit affirmed, basing its decision on precedent recognizing the prosecutorial duty to disclose

exculpatory evidence in the context of pre-trial disclosures. *Osborne v. Dist. Attorney's Office for Third Judicial Dist.*, 521 F.3d 1118, 1128 (9th Cir. 2008).

This Court granted certiorari and reversed, concluding the Ninth Circuit improperly expanded the scope of the Due Process Clause and this Court's holdings in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987) and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) to include a procedural due process right to post-conviction access to evidence. *Osborne*, 129 S. Ct. at 2315-22. In reaching the determination that Osborne did not state a procedural due process claim, this Court "assume[d] without deciding that the Court of Appeals was correct that *Heck* does not bar Osborne's § 1983 claim." *Id.* at 2319. Although the Court of Appeals did not address Osborne's claim on substantive due process grounds, Osborne asked this Court to "recognize a freestanding right to DNA evidence untethered from the liberty interests" that he sought to vindicate. *Id.* at 2322. This Court expressly "reject[ed] the invitation" and concluded that in the circumstances of Osborne's case "there is no such substantive due process right." *Id.* To the extent Petitioner suggests that in *Osborne* this Court recognized a freestanding substantive due process right to access state evidence post-conviction, he is incorrect.

Petitioner has not demonstrated a conflict between this Court's precedent and the decision of the Wisconsin Court of Appeals. The Petition should be denied.

III. PETITIONER HAS NOT SHOWN A CONFLICT BETWEEN THE WISCONSIN COURT OF APPEALS' DECISION AND FEDERAL APPELLATE PRECEDENT ON THE APPLICABILITY OF *HECK V. HUMPHREY*.

Petitioner asserts that a conflict exists between the Wisconsin Court of Appeals' decision and "most decisions of the federal courts on the ongoing hindered right of postconviction access issue." (Petition at 23). Implicit in Petitioner's position is the notion that his claims fall within an exception to *Heck* and that he is not required to have first successfully challenged his conviction. Petitioner asserted § 1983 claims for damages against Respondent in his Complaint. He seems now to suggest that he is also seeking injunctive relief, though it was not alleged in the Complaint and, as discussed, has taken on a new form through his Petition.

Petitioner also conflates being unable to pursue habeas relief in the first instance with his own circumstance of having unsuccessfully pursued such relief in multiple forums. In *Heck v. Humphrey*, this Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state

> tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. 477, 486-87, 114 S. Ct. 2364 (1994).

Moreover, the federal appellate cases pointed to by Petitioner are factually distinguishable.[6] (Petition

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[6] Petitioner also points to two district court cases, one of which is unpublished, and neither of which has been cited or adopted by a federal court of appeals. Petitioner characterizes his claim as "substantially identical", Petition at 23, to the claim addressed in *Lueck v. Wathen*, 262 F. Supp. 2d 690 (N.D. Tex. 2003). However, Lueck was a prisoner actually in possession of specific documents including the affidavit of a key witness to the crime underlying his conviction, that he hoped would establish the ineffective assistance of his trial counsel based on counsel's

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at 23-25). In *Carr v. O'Leary*, 167 F.3d 1124, 1125 (7th Cir. 1999), Carr had a pending § 1983 lawsuit asserting due process claims against prison officials at the time that *Heck* was decided. The United States Court of Appeals for the Seventh Circuit held that because Carr had been released from prison and could no longer seek habeas relief, his claims were not barred by *Heck*. *Id.* at 1127. *Figueroa v. Rivera*, 147 F.3d 77, 80-81 (1st Cir. 1998), involved § 1983 claims by the family members of an inmate who died in custody while in the process of challenging his conviction through a habeas petition. The court found that no equitable exception to *Heck* existed. 147 F.3d at 81. *Jenkins v. Haubert*, 179 F.3d 19, 21 (2nd Cir. 1999) involved § 1983 claims based on disciplinary sanctions affecting the conditions of confinement, but not fact or duration of confinement. The United States Court of Appeals for the Second Circuit concluded that such claims are not barred under *Heck* and the

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failure to interview the witness. 262 F. Supp. 2d at 695. These materials were confiscated and not returned by prison officials later named as defendants in a § 1983 action. *Id.* at 693. Lueck alleged he was unable to obtain another affidavit from the key witness. *Id.* at 693-95. Unlike Petitioner, who challenged his conviction through a habeas petition and various subsequent appeals and proceedings, Lueck's § 1983 claim was based on his alleged inability to assert a challenge at all. *Id.* at 697. Similarly, in *Barnwell v. West*, an inmate claimed that an inadequate law library and misrepresentations by an official regarding his access to the law library prevented his late-filing of a petition. *Barnwell v. West*, No. 02-CV-0925-DRH, 2006 WL 381944, at *1-*4 (N.D. Ill. Feb. 16, 2006). *Lueck* and *Barnwell* are inapplicable to show an exception to *Heck* for Petitioner's claims.

holding of *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584 (1997), if the prisoner is unable to challenge the conditions of confinement through a petition for federal habeas corpus. *Jenkins*, 179 F.3d at 21.

Petitioner points to *Huey v. Stine*, 230 F.3d 226, 227-28 (6th Cir. 2000), a case involving an inmate's § 1983 claims of cruel and unusual punishment based on his altercation with jail staff and the resulting disciplinary sanctions. The court concluded that *Heck* applied to bar the claims even if the inmate was no longer "in custody" for purposes of pursuing federal habeas relief. 230 F.3d at 229-31. In *Nance v. Vieregge*, 147 F.3d 589 (7th Cir. 1998), an inmate was being transferred to a facility closer to the court that was hearing his motion to withdraw his guilty plea. The property clerk told the inmate he could not take his legal documents, which included "photocopies of cases Nance wanted to have handy when arguing in support of his motion" but the warden assured him the papers would follow him. 147 F.3d at 590. When the papers were not transferred, a ruckus ensued and the inmate received a mild sanction. *Id.* The court addressed whether the inmate stated an access to the courts claim and concluded that the inmate had two available options: to proceed in state court for damages for the value of the photocopies as personal property, or to initiate a collateral attack on the judgment resting on his guilty plea. *Id.* at 591-92. The court did not find an exception to *Heck*.

Petitioner remains "in custody," has not been released from prison, is not deceased, and has pursued habeas relief. He is not asserting conditions of confinement or cruel and unusual punishment claims. The cases he cites are inapplicable to show an exception to *Heck* for Petitioner's claims.

The cases relied upon by Petitioner do not demonstrate a conflict between the Wisconsin Court of Appeals' decision and federal appellate precedent. He has not demonstrated any conflict justifying certiorari review. The Petition should be denied.

IV. PETITIONER HAS NOT IDENTIFIED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THIS COURT.

Petitioner suggests that this Court should address whether a convicted defendant may "use § 1983 to restore post-conviction and habeas access to the courts when he has no other forum to decide a non-frivolous claim because government officials deliberately hindered his only remaining viable opportunity for justice." (Petition at 31-32). What Petitioner essentially requests is that this Court provide him with *additional* post-conviction access to the courts. The Petition seeks relief unique to Petitioner's circumstances born of years and years of post-conviction litigation. He has not identified an important question of federal law which has yet to be addressed by this Court. The Petition should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY

State ex rel.
Scott A. Heimermann

Plaintiff,

vs.

Gary R. McCaughtry, et al.,

Defendants.

Case No. 04 CV 1499

DECISION AND ORDER

The instant action began with a lawsuit filed by Plaintiff Scott A. Heimermann (Heimermann) in 2004. Heimermann, a prisoner, seeks several forms of relief, including over four million dollars in compensatory damages, from Defendants Gary R. McCaughtry (McCaughtry), Mark. W. Clements (Clements), John O'Donovan (O'Donovan), John Dehaan (Dehaan), Michael J. Sullivan (Sullivan), Cindy O'Donnell (O'Donnell), Steven B. Casperson (Casperson), Stephen M. Puckett (Puckett), Sam Schneiter (Schneiter), Timothy Douma (Douma), Lynda J. Schwandt (Schwandt) and Joanne Swyers (Swyers). Swyers, as the only non-state defendant in this action, filed a Motion to Dismiss on April 30, 2007.[1] Shortly

[1] The court will refer to McCaughtry, Clements, O'Donovan, Dehaan, Sullivan, O'Donnell, Casperson, Puckett, Schneiter,
(Continued on following page)

thereafter, the State Defendants filed a Motion to Dismiss in Part.

Both motions have been fully briefed and the court finds this matter ripe for resolution; however, in the interest of clarity, this Decision and Order addresses only the State Defendants' motion. For the reasons set forth herein, the court holds that Heimermann's contract, retaliation, "Heck" and access to courts claims against the State Defendants are dismissed. In addition, the portion of his interference with business claims grounded in due process is also dismissed. Finally, Heimermann may not proceed on any Wisconsin Organized Crime Control Act (WOCCA) and the Racketeer Influenced and Corrupt Organizations Act (RICO) claims at this time. Therefore, only his failure-to-protect and First Amendment based interference with business claims remain.

BACKGROUND[2]

Heimermann is an inmate in the custody of the Wisconsin Department of Corrections (DOC) and each

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Douma and Schwandt collectively as "State Defendants." As Swyers is not employed by the State and has filed a separate motion, the court will refer to her only as "Swyers."

[2] The procedural background leading to the current motions to dismiss is lengthy and complicated. As such, this court will not detail every filing presented in the last three years, but will instead briefly detail those procedural highlights most relevant to the pending motions.

of the State Defendants are employed by the DOC. Briefly, the State Defendants hold, or have held, the following positions with the DOC:

- McCaughtry is the Warden at the Waupun Correctional Institution (WCI).
- Clements is the Security Director at WCI.
- O'Donovan is a Captain for Security at WCI.
- Dehaan was/is a Lieutenant and Captain for Security at WCI.
- Sullivan is a former Secretary of the DOC.
- O'Donnell was a Deputy Secretary at the DOC.
- Casperson is the former Warden of WCI and current Administrator of the Division of Adult Institutions at the DOC.
- Puckett is the Director of the Bureau of Offender Classification and Movement at the DOC.
- Schneiter is the Security Chief for the Division of Adult Institutions at the DOC.
- Douma is the Security Director at Columbia County Correctional Institution (CCI).

- Schwandt was the Administrative Captain at CCI.[3]

The remaining defendant, Swyers, is an Investigator for the Dodge County Sheriff's Office.

Heimermann initiated this action, brought under 42 U.S.C. §1983 as well as other state common law causes of action, with the filing of a 48-page complaint on May 14, 2004. The case was originally assigned to Judge Maryann Sumi. On June 29, 2004, the State Defendants filed a Notice of Removal to Federal Court. The next day, Swyers filed an Answer in which she asserted several affirmative defenses and requested dismissal of Heimermann's claims against her.

The United States District Court for the Eastern District of Wisconsin then issued a July 14, 2004 Order in which Judge William Griesbach dismissed Heimermann's suit. Judge Greisbach found that Heimermann was "effectively barred" from pursuing this case due to an [sic] Seventh Circuit Court sanction prohibiting him from filing any further actions until certain fines were paid. (R. 21:2-3.)[4]

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[3] The Complaint also lists other unknown State Defendants, *e.g.* John Doe and Richard Roe, who were employed by the DOC in various security positions.

[4] The only exception to the Seventh Circuit's prohibition appears to be criminal cases and habeas petitions *not challenging* Heimermann's 1991 conviction.

On September 24, 2004, Heimermann filed a Notice of Motion and Motion for Reinstatement of Case. Heimermann argued that the State Defendants had "defrauded" the state court "by not verifying the Seventh Circuit's restrictive filer order." (R. 24:4.) Heimermann requested that a June 30, 2004 judicial entry of dismissal be set aside and that the case be reinstated. Both Swyers and the State Defendants opposed the motion. (*See*, R. 29, 30.) After a hearing on the matter, Judge Sumi dismissed Heimermann's complaint with prejudice in a written order dated January 14, 2005. Heimermann then appealed Judge Sumi's decision to the Wisconsin Court of Appeals.[5]

On December 15, 2005, the Court of Appeals attempted to certify the following question to the Wisconsin Supreme Court:

> Simply put, the question is whether we have the authority to do what the State asks: does this court have the power to restrict future filings *in the circuit court?* May this court (or the circuit court) refuse to accept for filing a case because of unpaid sanctions in a different case in any state court? May this court or the circuit court refuse to accept for filing a case because of unpaid sanctions in federal court?

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[5] Actually, Heimermann appealed Judge Sumi's decision immediately after the hearing, but prior to the entry of her written order. (R. 42-1).

State ex rel. Heimermann v. McCaughtry, No. 2005AP87, 2005 WL 3434744, at *2 (Ct. App. Dec. 15, 2005). On February 27, 2006, the Wisconsin Supreme Court accepted certification from the Court of Appeals. *State ex rel. Heimermann v. McCaughtry,* 2006 WI 23, 289 Wis.2d 15, 712 N.W.2d 39 (Table). However, on June 14, 2006, the court reversed its decision, holding that "[b]ecause it appears that plaintiff-appellant remains unwilling to limit argument to the issue properly before the court, the certification was improvidently accepted in this case." *State ex rel. Heimermann v. McCaughtry,* No. 2005AP87, at *2 (June 14, 2006). The court then remanded the case to the Court of Appeals.

In an unpublished decision filed January 25, 2007, the Court of Appeals held:

> We conclude that the circuit court erred in relying on the doctrine of comity in refusing to reinstate Heimermann's case and in dismissing his complaint. Under the doctrine of comity, "courts will, as a matter of discretion, rather than obligation, defer to the assertion of jurisdiction or give effect to the judgments of other states or sovereigns out of mutual respect and for the purpose of furthering the orderly administration of justice." *Mills v. Vilas County Bd. of Adjustments,* 2003 WI App 66, ¶ 19, 261 Wis.2d 598, 660 N.W.2d 705, citing *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians,* 2000 WI 79, ¶ 35, 236 Wis.2d 384, 612 N.W.2d 709. Whether to

apply the doctrine of comity is committed to the circuit court's discretion. *Teague,* 236 Wis.2d 384, ¶ 35, 612 N.W.2d 709.

Here, the concurrent assertion of jurisdiction is not at issue. Instead, the issue is whether the circuit court properly gave effect to the federal court's judgment: that is, did the circuit court properly exercise its discretion when it refused to allow Heimermann to proceed *in a Wisconsin circuit court* based on a federal court sanction restricting his filing *in federal court?* We conclude that it did not. The circuit court did more than simply give effect to the federal court order barring Heimermann from federal court, it extended the scope of the federal court's order to encompass *future filings in the Wisconsin courts.* The parties do not provide us with any authority for using comity in this context. We conclude that the circuit court erroneously exercised its discretion in applying the doctrine of comity to bar Heimermann's filing.

We next address whether the circuit court's decision should be affirmed because Heimermann has failed to state a claim or because he is improperly attempting to relitigate a conviction that he has already challenged in several prior actions. We cannot resolve these questions based on the briefing before us. However, we note that Heimermann's complaint alleges conduct that relates to incidents that have occurred

> since he has been imprisoned and thus does not relate to his conviction.
>
> We also note that he has presented an argument in his briefs on appeal that his claim is cognizable under *Heck v. Humphrey,* 512 U.S. 477, 489, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The circuit court may take up these questions on remand. If the circuit court determines that Heimermann has failed to state a claim or that his complaint is frivolous, the circuit court may impose appropriate sanctions.

State ex rel. Heimermann v. McCaughtry, 2007 WI App. 34, ¶¶ 5-7,728 N.W.2d 373 (Table), 2007 WL 188898. The case was remanded to Judge Sumi; however, on March 12, 2007, Heimermann moved for substitution. The case was reassigned to Judge Sarah O'Brien on March 19, 2007 and further reassigned to this court on March 27, 2007.

On May 14, 2007, the State Defendants filed the pending motion to dismiss in part. This court has reviewed the parties' briefs on the State Defendant's motion and this Decision and Order addresses the same.

HEIMERMANN'S COMPLAINT

Heimermann's complaint contains allegations that reach back to 1991, when the criminal complaint in his underlying conviction was filed. The lengthy Complaint contains eleven numbered paragraphs in

the "CAUSES OF ACTION" section. Heimermann's brief, however, describes only eight:

> (1) contract-based claims against defendants Swyers, Dehaan, Casperson, O'Donnell, Sullivan and Doe **(Compl. at ¶¶ 52-57, 107-08);**
>
> (2) a ***Heck v. Humphrey*** claim against defendants Swyers, Dehaan, Casperson, O'Donnell, Sullivan and Doe **(Compl. at ¶¶52-57, 109);**
>
> (3) that defendants Swyers, Dehaan, Casperson, O'Donnell, Doe and Sullivan violated Soctt's [sic] due process rights to meaningful access to the courts **(Compl. at ¶¶96-106, 110-111);**
>
> (4) an affirmative failure-to-protect claim under §1983 against Swyers, Casperson, Puckett, Schneiter, McCaughtry, Clements, O'Donovan, Douma and Schwandt **(Compl. at ¶¶67, 69-70, 72-78, 84, 112-113);**
>
> (5) that defendants McCaughtry, Clements, O'Donovan, Douma and Schwandt retaliated against Scott for filing his internal grievances about his work and testimony in the Fecke et al. case by fabricating conduct reports and unjustly disciplining him **(Compl. at ¶¶50, 52-54, 60, 67-95, 114-115);**
>
> (6) that defendants Casperson, Puckett, Schneiter and O'Donnell condoned and ratified the unconstitutional retaliatory

> conduct of their subordinates since Scott's return from the custody of the Minnesota Department of Corrections on March 23, 2001 **(Compl. at ¶¶64, 72, 74-78, 84, 93-94, 114-115);**
>
> (7) that defendants McCaughtry, Clements, O'Donovan and Doe intentionally interfered with Scott's prospective contractual and business relations with attorneys, public elected officials and other outsiders about developing his patent into a viable business to be run outside the prison **(Compl. at ¶¶85-95, 116-117);** and
>
> (8) a "concerted action" within the meaning of Wis. Stat. §895.045(2) against Swyers for the combined injury caused by the state defendants.

(Heimermann Br., p. 5, emphasis in original.) Thus, seven of the eight causes of action involve the State Defendants. Briefly, those claims can be summarized as follows:

- *First Cause of Action:* Breach of contract claim against various State Defendants and Swyers based on Heimermann's alleged assistance in the investigation and prosecution of Robert Fecke (Fecke). Heimermann claims that certain State Defendants and Swyers made various promises to him in exchange for his assistance. (Compl. ¶52.) Heimermann alleges that he was offered immunity from further discipline on conduct report

912772 and that said conduct report was to be expunged from his prison record; that he was granted immunity from prosecution based on any evidence that might come to light during the investigation; that he was promised certain exculpatory information from a witness protection inmate, Edward J. Piscitello (Piscitello); and that he would be transferred to a minimum security facility until he was released from prison. (Id.) Based on these promises, Heimermann allegedly worked undercover on the Fecke investigation for nearly two months. (Compl. ¶53.) Heimermann claims that these promises, and his performance, led to an implied-in-law agreement that the State Defendants breached. (Compl. ¶108.) On a theory of quantum meruit, Heimermann argues that he should be compensated for the services he provided. (Compl. ¶107.)

- *Second Cause of Action:* A "Heck" claim under which Heimermann asserts that he has been denied substantive due process. (Compl. ¶109.) Relying on the same facts alleged in support of his breach of contract claim, Heimermann claims that certain State Defendants and Swyers have denied him substantive due process by denying him access to Piscitello. (Id.) Per Heimermann, "the missing ingredient" in his "release from

prison recipe" is Piscitello's "exculpatory" testimony. (Id.)

- *Third Cause of Action:* An access to courts claim under which Heimermann contends that certain State Defendants and Swyers perpetrated fraud upon the Outagamie County Circuit in 1999 and continue to condone his unlawful confinement thereby violating his substantive due process rights. (Compl. ¶¶96, 110-111.) Heimermann claims that certain State Defendants and Swyers prevented him from clearing his name during state habeas corpus proceedings in 1999. (Compl. ¶96.) Heimermann contends that the State Defendants and Swyers knew about Piscitello's exculpatory testimony and that Fecke was helping him obtain it, but withheld that information from the judge in his habeas proceeding. (Compl. ¶103.)
- *Fourth Cause of Action:* A failure to protect claim under §1983 against certain State Defendants and Swyers based on their failure to keep Heimermann out of general population status. (Compl. ¶112.) Heimermann claims that, as a result of his assistance in the Fecke investigation, he is labeled a "snitch". (Compl. ¶112.) He argues that their deliberate indifference to his safety is a violation of his Eighth and Fourteenth Amendment rights. (Compl. ¶113.)

- *Fifth & Sixth Causes of Action:* Two claims of retaliatory conduct by State Defendants against Heimermann. (Compl. ¶¶96, 114-115.) In the first, Heimermann argues that certain State Defendants subjected him to "systemic discipline and prison transfer" in retaliation for his well-known litigation activities thereby violating the First, Eighth and Fourteenth Amendments. (Compl. ¶114.) In the second, Heimermann claims that the conduct reports and resulting periods of solitary confinement were "unrelated to prison security of discipline and were calculated to harass and intimidate plaintiff," thereby violating his Eighth and Fourteenth Amendment rights. (Compl. ¶115.)
- *Seventh Cause of Action:* An intentional interference with contract and business relations claim against certain State Defendants. (Compl. ¶¶116-17.) Heimermann claims that the CCI Librarian confiscated various documents related to his "ongoing real estate and finance business" and pending patent. (Compl. ¶86.) Heimermann alleges that these documents were part of his attempts to obtain outside legal counsel. (Id.) He further claims that these documents were then used as evidence in disciplinary actions against him. (Compl. ¶¶88-89, 92, 94-95.) Heimermann contends that the State Defendants violated his First and Fourteenth Amendment

rights by interfering with his pending patent application. (Compl. ¶116.) In addition, he claims that his Fourteenth Amendment rights were violated by State Defendants interference with his "lawfully established businesses." (Compl. ¶117.)

DISCUSSION

"The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." *Weber v. City of Cedarburg,* 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Only those allegations made within the complaint are relevant to the court's decision. *Id.* The court must accept the facts stated in the complaint, and the reasonable inferences that may be drawn from them, as true. *Friends of Kenwood v. Green,* 2000 WI App 217, ¶ 11, 239 Wis. 2d 78, 619 N.W.2d 271. In addition, the court may look to any document attached to the complaint and made part thereof. *Id.*

"A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations." *Watts v. Watts,* 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987).

The State Defendants argue that Heimermann's "Heck" and "Access to Courts" claims are barred by *Heck v. Humphrey,* 512 U.S. 477 (1994). In addition, they claim that he failed to exhaust his

administrative remedies with respect to his "Contract" and "Retaliation" claims. While the State Defendants have not moved to dismiss Heimermann's "Failure to Protect" claim, they reserve the right to do so in the future. In addition, they argue that the portion of his "Interference with Business" argument based on due process fails to state a claim upon which relief may be granted; however, they do not move to dismiss the portion of the claim based on the First Amendment, but reserve that right for future motions. Finally, the State Defendants argue that Heimermann's complaint does not allege violations of either the WOCCA or RICO; therefore, he should not be allowed to proceed with those claims.

I. CONTRACT CLAIMS

"A unilateral contract will be legally enforceable when it has induced substantial performance or when it has brought about a change of position on the part of the offeree." *Lazarus v. American Motors,* 21 Wis. 2d 76, 83, 123 N.W.2d 548 (1963). In the instant action, Heimermann argues that his assistance in the Fecke investigation resulted in a legally binding unilateral contract between himself and certain State Defendants. Based on the existence of this alleged contract, Heimermann contends that he is entitled to compensation; i.e. "transfer to a minimum security facility and the information supporting his factual innocence that he bargained for, earned and did not receive." (6/12/07Heimermann Br. P. 6.) Heimermann, however, may not proceed with this cause of action

because he has failed to exhaust his administrative remedies regarding this claim.

Wisconsin Statutes provide:

> [n]o prisoner may commence a civil action . . . with respect to the prison or jail conditions in the facility in which he or she is or has been incarcerated, imprisoned or detained until the person has exhausted all available administrative remedies that the department of corrections has promulgated by rule. . . .

§801.02(7)(b) Wis. Stats.

Chapter DOC 310 of Wisconsin's Administrative Code outlines the administrative remedies available to Wisconsin inmates. Section DOC 310.05 of that chapter similarly states:

> [b]efore an inmate may commence a civil action . . . against any officer, employee or agent of the department in the officer's, employee's or agent's official or individual capacity for acts or omissions committed while carrying out that person's duties as an officer, employee or agent or while acting within the scope of the person's office, the inmate shall exhaust all administrative remedies that the department of corrections has promulgated by rule.

Wis. Admin. Code § DOC 310.05.

In applying § DOC 310.05, the Wisconsin Court of Appeals has noted that when an inmate complaint

is rejected as untimely, the inmate has failed to exhaust his or her administrative remedies. *State ex rel. Laurich v. Litscher,* 2004 WI App 150, ¶9, 275 Wis. 2d 769, 686 N.W.2d 668.

On August 27, 2003, Heimermann filed complaint number WCI-2003-29004, in which he alleged that certain State Defendants failed "to comply with the terms and conditions of an implied-in-law agreement for obtaining services in the apprehension and convictions of former prison guards. . . ." (Murphy Aff., Ex. 5, p. 7.) Heimermann alleged that his performance under that agreement ended "on or about June 27, 2000," and that, since then, he had made several demands for the services agreed upon under the agreement, but those services had not been provided. (Murphy Aff., Ex. 5, p. 8.) However, complaint number WCI-2003-29004 was rejected as untimely under § DOC 310.09(6).[6] (Murphy Aff., Ex. 5, p. 2.)

Based on this rejection, the State Defendants now argue that Heimermann's contract claims should be dismissed for failure to exhaust. In response, Heimermann claims that his complaint fell under the "good cause" exception of § DOC 310.09(6) and that the complaint examiner failed to properly investigate

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[6] Wis. Admin. Code § DOC 310.09(6) provides: An inmate shall file a complaint within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may except a late complaint for good cause.

that cause. Due to this alleged failure, Heimermann argues that the State Defendants cannot claim that he failed to exhaust his administrative remedies. Heimermann, however, has waived this argument.

"If an inmate believes there are facts constituting 'good cause,' he or she must advise the institution complaint examiner by means of including the asserted facts in the complaint." *State ex rel. Laurich*, 2004 WI App 150, ¶15. "The failure to reasonably apprise the institution complaint examiner, by means of the complaint itself, of the facts the inmate believes constitute 'good cause' waives the inmate's right to later complain that his or her complaint should have been accepted later for 'good cause'". *Id.* Contrary to Heimermann's assertion, his offender complaint *did not* put the examiner on notice of his "good cause" exception. (Murphy Aff., Ex. 5, p. 7-8.) Rather, he waited until his complaint was rejected as untimely before asserting a factual basis for application of the good cause exception. (Murphy Aff., Ex. 5, pp. 36-38.) Heimermann has thus waived this argument; therefore, the court holds that Heimermann failed to exhaust his administrative remedies and finds that his contract claims must be dismissed.[7]

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[7] In an alternative, undeveloped argument, Heimermann also asserts that no administrative remedies were available to him on his contract claims. However, the court need not address this argument because Wis. Admin. Code § DOC 310.01(2)(a) makes clear that the inmate complaint review system is meant to address conduct of the type alleged here.

II. *"HECK"* CLAIM

The Civil Rights Act, §1983, states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. §1983. Thus, "[i]In [sic] order to state a claim under §1983 a plaintiff must allege: (1) that defendants deprived him of a federal constitutional right; and (2) that the defendants acted under the color of state law." *Savory v. Lyons,* 469 F.3d 667, 670 (7th Cir. 2006).

While the United States Supreme Court has described §1983 as a broad, general statute, the Court has chosen to limit its applicability in actions where the specific language of the federal habeas corpus statute would also apply. *Preiser v. Rodriguez,* 411 U.S. 475, 489 & 500 (1973). As such, in *Prieser,* the Court held that:

> when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Id. at 500.

In *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994), the Court further explained:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been

> invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

In summarizing the *Preiser* and *Heck* line of cases, the Court recently stated:

> [t]hese cases, taken together, indicate that a state prisoner's §1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005).

In the case at bar, Heimermann alleges that certain State Defendants have denied him access to exculpatory testimony. As such, he seeks " . . . evidence to demonstrate his factual innocence." (Heimermann Br., p. 7.) Heimermann himself concedes that this claim is susceptible to the *Heck* analysis, but argues that "this suit is not, and should not be construed as, an action to question the validity of his conviction or sentence." (Id.) Not surprisingly, the State Defendants disagree.

The Seventh Circuit Court of Appeals recently stated "[s]pecial attention . . . must be given to the

manner in which the plaintiff frames his complaint, and the consequences that would follow from a favorable disposition." *Savory,* 469 F.3d at 672. Looking to the factual allegations cited in support of this claim, Heimermann's phrasing of the cause of action and the fourth paragraph of his "Prayer for Relief", the court finds that Heimermann is seeking exculpatory testimony, which would necessarily call into question the validity of his underlying conviction. (Compl. ¶¶52-57, 109; p. 47.) He is not asking for evidence that may or may not result in his release, he is asking for *exculpatory* testimony that is "the missing ingredient to [his] release from prison recipe." (Id. ¶109.) In essence, Heimermann is challenging the very fact of his imprisonment. As such, this court finds that Heimermann's "Heck" claim is barred and should be dismissed.

III. ACCESS TO COURTS CLAIM

Under the due process clause, prisoners have a constitutional right of meaningful access to the courts. *Bounds v. Smith,* 430 U.S. 817, 822 (1977). In his third cause of action, Heimermann alleges that certain State Defendants violated this right during a 1999 habeas proceeding by withholding information from the judge. Specifically, that State Defendants withheld information regarding Piscitello's exculpatory testimony, which hampered his ability to prove his factual innocence. Heimermann's claim, however, is not cognizable under §1983.

As with his "Heck" claim, Heimermann's access to courts claim seeks exculpatory testimony, which would necessarily call into question the validity of his underlying conviction. Because this third cause of action challenges the very fact of imprisonment, it is barred by *Heck*; therefore, Heimermann's access to courts claim is dismissed.

IV. FAILURE TO PROTECT CLAIM

The State Defendants do not, at this time, seek dismissal of Heimermann's failure to protect claim, but reserve their right to do so in the future; therefore, the court will not address the issue at this juncture.

V. RETALIATION CLAIMS

"Prisoners are entitled to utilize available grievance procedures without threat of recrimination. . . ." *Hoskins v. Lenear* 395 F.3d 372 (7th Cir. 2005) (internal citation omitted). In his fifth and sixth causes of action, Heimermann alleges that certain State Defendants subjected him to "systemic discipline and prison transfer" because of his litigation activities and that the resulting conduct reports and periods of solitary confinement violated his Eighth and Fourteenth Amendment rights. (Compl. ¶¶114-15.) However, as with his contract claims, Heimermann has failed to exhaust his administrative remedies on his retaliation claims.

The State Defendants argue that the only offender complaint in which Heimermann raised issues of retaliation is complaint number WCI-2003-39925. (Murphy Aff., Ex. 8.) The complaint examiner rejected that complaint as untimely under Wis. Admin. Code § DOC 310.11(5)(d).[8] (Murphy Aff., Ex. 7, p. 2.) Based on this rejection, the State Defendants claim that Heimermann failed to exhaust his administrative remedies.

Heimermann, however, claims that he was not required to file an offender complaint because the complaint in *this action* gave the State Defendants sufficient notice of his claims against them. Heimermann confuses the law regarding sufficiency of pleading with that of administrative exhaustion. While it is true that his complaint need only specify the bare minimum of facts necessary to put the State Defendants on notice of his claims in this action, Heimermann must still satisfy Wisconsin's administrative exhaustion requirements.

As noted above, when an inmate complaint is rejected as untimely, the inmate has failed to exhaust his or her administrative remedies. *State ex rel.*

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[8] Wis. Admin. Code § DOC 310.11(5)(d) provides:

(5) The ICE may reject a complaint for the following reasons:

(d) The inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the ICE to extend the time limits.

Laurich, 2004 WI App 150, ¶9. Because Heimermann failed to do so with respect to his retaliation claims, those claims must be dismissed.

VI. INTERFERENCE WITH BUSINESS CLAIMS

A. First Amendment Rights

The State Defendants do not, at this time, seek dismissal of Heimermann's claim that his first amendment rights were violated by certain State Defendants alleged interference with his business communications. As such, the court does not address the issue at this juncture.

B. Due Process Rights

"The procedural guarantees of the Due Process Clause apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Taplick v. City of Madison Personnel Bd.,* 97 Wis. 2d 162, 169, 293 N.W.2d 173 (1980). Therefore, to determine whether the requirements of the Due Process Clause apply, a court must first look to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 570-71 (1972).

In the instant action, Heimermann appears to argue that he has both a property and liberty interest in "his communications with outsiders about his lawfully established businesses. . . ." (Heimermann Br., p. 11.) However, after reviewing Heimermann's

complaint, this court finds no allegations describing a deprivation of either a property or liberty interest.

First of all, "[ ]though an individual does not lose all his constitutional rights upon being imprisoned, his rights are clearly circumscribed." *Secret v. Brierton,* 584 F. 2d 823, 829 (7th Cir. 1978) (internal citation omitted). As such, "one's right to possess personal property is severely diminished upon imprisonment." *Id.* at 830. Secondly, "[p]roperty interests are not created by the Constitution; they are created and defined by existing rules or mutually explicit understandings that stem from an independent source such as state laws, ordinances or an implied contract that secure certain benefits and support claims of entitlement to those benefits." *Taplick,* 97 Wis. 2d at 170 (internal citation omitted).

Third, Wis. Admin. Code. § DOC 303.32(1) prohibits inmates from engaging in "a business or enterprise" except for in limited circumstances not applicable here.[9] However, even if this court were to

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[9] Wis. Admin. Code § DOC 303.32(1) provides:

> (1) Any inmate who engages in a business or enterprise, whether or not for profit, or who sells anything except as specifically allowed under other sections is guilty of an offense, except for the following situation
>
> (a) An inmate who was owner or part owner of any business or enterprise prior to sentencing may communicate with the inmate's manager or partner concerning the management of the enterprise or business.

(Continued on following page)

find one of these exceptions applicable, the Wisconsin Court of Appeals has previously held that "prison administrative rules are not enacted for the benefit of individual inmates and do not create any liberty or property interests." *Richards v. Cullen,* 152 Wis. 2d 710, 713, 449 N.W.2d 318 (Ct. App. 1989). Heimermann has thus failed to identify the source of any property interest of which he was allegedly deprived.

Heimermann, however, also claims to have a liberty interest at stake. Citing *Procunier v. Martinez,* 416 U.S. 396, 418 (1974); in which the United State [sic] Supreme Court noted that prisoners have a liberty interest in uncensored communication by letter, Heimermann argues that he has a liberty interest in unfettered communications with outsiders. What Heimermann fails to address is the Court's proviso that even this liberty interest is "qualified of necessity by the circumstance of imprisonment." *Id.* Nor does he claim that the State Defendants violated any of the various procedures under which the Court found that a prisoner's mail may be censored. *See, Id.* at 418-419. Thus, Heimermann has also failed to allege any deprivation of a liberty interest.

In short, Heimermann's complaint contains no allegations of any deprivation of either a liberty or

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(b) An inmate may write and seek publication of works in accordance with these rules and institutional policies and procedures.

property interest subject to the procedural guarantees of the Due Process Clause. As such, he has failed to state a due process claim against the State Defendants. For these reasons, the court finds that his interference with business claims grounded in due process should be dismissed.

VII. ORGANIZED CRIME AND RACKETEERING CLAIMS

In his brief, Heimermann alleges that certain unspecified State Defendants violated the WOCCA and RICO.[10] (Heimermann Br., p. 12.) Specifically, that these State Defendants' interference with his prospective business and contractual relations violated both acts. However, his complaint fails to allege violations of either provision and thus failed to provide the State Defendants with sufficient notice of such claims. As such, the court holds that Heimermann may not proceed with these claims at this time.

CONCLUSION

As Heimermann failed to exhaust his administrative remedies with respect to his contract claim, his contract claims against the State Defendants are DISMISSED. Similarly, Heimermann failed to exhaust his administrative remedies with respect to

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[10] Heimermann contends that these claims were included in various submissions to this court in April of 2007. (Heimermann Br., p. 12.)

his two retaliation claims, thus both retaliation claims against the State Defendants are also DISMISSED.

Because Heimermann is challenging the very fact of his imprisonment, the court finds that his "Heck" claim is barred. As such, Heimermann's "Heck" claim against the State Defendants is also DISMISSED. Heimermann's access to courts claims also challenges the very fact of imprisonment; therefore, it is likewise barred by *Heck* and also DISMISSED.

Heimermann's complaint contains no allegations of any deprivation of either a liberty or property interest subject to the procedural guarantees of the Due Process Clause. As such, he has failed to state a due process claim against the State Defendants and his interference with business claims grounded in due process are DISMISSED.

Finally, because Heimermann's complaint does not contain allegations regarding any violation of either the WOCCA or RICO laws, Heimermann may not proceed on those claims at this time. Thus, only Heimermann's failure-to-protect and First Amendment based business claims against the State Defendants remain.

This Decision and Order is not a final order that disposes of the entire matter in litigation as to any party and *is not intended by the court to be an appealable order within the meaning of sec. 808.03(1), Wis. Stats.*

IT IS SO ORDERED by the Court this 27th day of September, 2007.

/s/ David T. Flanagan
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann